

§ 779.261

allowed on the trade-in merchandise. In turn, when the trade-in merchandise is sold the amount of the sale will be included in the annual gross volume.

EXCISE TAXES

§ 779.261 Statutory provision.

Sections 3(s)(1) and 13(a)(2) of the amended Act as well as sections 3(s)(1), 3(s)(2), 3(s)(5), and 13(a)(2)(iv) of the prior Act provide for the exclusion of “excise taxes at the retail level which are separately stated” in computing the gross annual volume of sales or business or the annual dollar volume of sales for purposes of certain of the provisions contained in those sections. The Senate Committee report states as follows with respect to this provision:

* * * in determining whether the enterprise or establishment, as the case may be, has the requisite annual dollar volume of sales, excise taxes will not be counted if they are taxes that are collected at the retail level and are separately identified in the price charged the customer for the goods or services at the time of the sale. Excise taxes which are levied at the manufacturer's, wholesaler's, or other distributive level will not be excluded in calculating the dollar volume of sales nor will excise taxes be excluded in cases where the customer is charged a single price for the merchandise or services and the taxes are not separately identified when the sale is made. (S. Rept., 145, 87th Cong., first session, p. 39.)

In applying the above rules to determine annual gross volume of sales or business under section 3(s) or annual dollar volume of sales for purposes of the \$250,000 test under section 13(a)(2), excise taxes which (a) are levied at the retail level and (b) are separately stated and identified in the charge to the customer at the time of sale need not be included in the calculation of the gross or dollar volume of sales. Excise taxes which are levied at the manufacturer's, wholesaler's or other distributive level will not, ordinarily, be excluded in calculating the volume of sales, nor will excise taxes, even if levied at the retail level, be excluded in cases where the customer is charged a single price for the merchandise or services and the taxes are not separately identified when the sale is made. Excise taxes will be excludable whether they are levied by the Federal, State,

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or local government provided that the tax is “levied at the retail level” and “separately stated”.

§ 779.262 Excise taxes at the retail level.

(a) Federal excise taxes are imposed at the retail level on highway vehicle fuels other than gasoline under the provisions of 26 U.S.C. 4041. Such excise taxes are levied at the retail level on any liquid fuel sold for use, or used in a diesel-powered highway vehicle. A similar tax is imposed on the sale of such special motor fuels as benzene and liquefied petroleum gas when used as a motor fuel. To the extent that these taxes are separately stated to the customer, they may be excluded from gross volume of sales. The extent to which State taxes are levied at the retail level, and thus excludable when separately stated, depends, of course, upon the law of the State concerned. However, as a general rule, State, county, and municipal sales taxes are levied at the retail level, and to the extent that they are separately stated, may be excluded. All State excise taxes on gasoline are, for purposes of section 3(s), taxes levied at the retail level, which, if separately stated, may be excluded.

(b) The circumstances surrounding the levying and collection of the Federal excise taxes on gasoline, tires, and inner tubes reflect that, although they are listed under the title of “Manufacturers Excise Taxes,” they are, in practical operation, taxes “at the retail level.” Federal excise taxes on gasoline, tires, and inner tubes, when “separately stated,” may therefore be excluded in computing the annual gross volume of an enterprise for the purpose of determining coverage under section 3(s)(1) of the Act and section 13(a)(2) for purposes of applying the \$250,000 test for determining the retail and service establishment exemption of an establishment in a covered enterprise.

§ 779.263 Excise taxes not at the retail level.

There are also a wide variety of taxes levied at the manufacturer's or distributor's level and not at the retail level. It should be noted, however, that